No. 224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

OSAKA SHOSEN KAISHA LINE,
Claimant of the STEAMSHIP "SANTOS MARU",
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit

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J. NEWTON RAYZOR,
Attorney for Osaka Shosen Kaisha Line

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Osaka Shosen Kaisha Line, respectfully presents its petition for a Writ of Certiorari addressed to the United States Circuit Court of Appeals, for the Fifth Circuit, to review a judgment of said Court reversing a judgment of the District Court for the Southern District of Texas in favor of Osaka Shosen Kaisha Line, petitioner herein, dismissing the libel of the United States of America, respondent herein, the case being remanded with instructions to enter judgment for the United States of America. (R., pp. 32-36). The judgment of the Circuit Court of Appeals was rendered on the 10th day of June, A. D., 1936. (R., p. 32).

SHORT STATEMENT OF FACTS

The Steamship "Santos Maru", belonging to the Osaka Shosen Kaisha Line, arrived at the port of New Orleans, Louisiana, on June 11th, 1932, having as a third class passenger one Salvatore Sprovieri, an alien en route from Brazil to Japan on a through ticket, with no visa entitling him to enter the United States. At New Orleans the immigration officers served upon the master an order in writing instructing him to detain all third class passengers aboard the vessel at all ports of the United States. On June 19, 1932, the third class passenger Salvatore Sprovieri escaped from the vessel, through the negligence of the officers and crew of said steamship the District Court found upon demurrer. The immigration authorities were notified of the escape by the agents of the vessel; the alien was subsequently arrested and deported upon another vessel of the petitioner.

The Secretary of Labor, considering it impracticable to proceed by criminal action, instituted this libel *in rem* under Sec. 146, Title 8, Mason's U. S. C., (Section 10 of the Act of February 5, 1917, as amended by the Act of May 26, 1924, Section 27) for failure to prevent the landing of the alien at a time and place other than that designated by the immigration authorities. (R., pp. 16-17.)

Upon demurrer, the District Court found the facts as outlined above and dismissed the libel. (R., pp. 14-19.)

The United States appealed to the Circuit Court of Appeals for the Fifth Circuit, and that Court, declining to follow the decisions of the Circuit Court of Appeals for the Second Circuit, reversed the holding of the lower court, remanding the case with instructions to enter judgment for libellant. (R., pp. 32-36.)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

1. As the Circuit Court of Appeals for the Fifth Circuit acknowledges, its decision is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in The Havana, etc., 63 F. (2d) 812 (CCA 2, 1933).

2. The decision of the Circuit Court of Appeals is probably in conflict with the decisions of this Honorable Court in Taylor vs. United States, 207 U. S. 120, 28 S. Ct. 53, 52 L. Ed. 130, and United States vs. SS Coamo, 267 U. S. 220, 45 S. Ct. 237, 69 L. Ed. 582.

3. The extent of the powers of the immigration authorities under Section 146, Title 8, Mason's U. S. C., is a question of general importance which has not been but should be decided by this Honorable Court, the effect of the decision of the Circuit Court of Appeals being greatly to enlarge the powers of those authorities.

4. By its decision the Circuit Court of Appeals construed Section 146, Title 8, Mason's U. S. C., as granting to the immigration authorities the broad power of issuing orders to a master of a vessel to detain persons aboard the vessel and not to permit their landing in the United States, their escape to be at the peril of the vessel; the language of the section grants no such power, and it is a strained judicial enlargement of a highly penal statute to construe it as containing such a grant.

WHEREFORE, petitioner prays that a writ of certiorari may issue directed to the United States Circuit Court of Appeals for the Fifth Circuit, directing said Court to certify the whole record to this Court for a hearing and determination; and that upon a hearing

the judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and proper directions given for further relief and remedy in the premises as to this Honorable Court may seem proper and in conformity with law.

OSAKA SHOSEN KAISHA LINE,

By J. NEWTON RAYZOR.

J. Newton Rayzor

STATE OF TEXAS,
COUNTY OF HARRIS.

J. Newton Rayzor, being duly sworn, deposes and says: That he is the attorney for the petitioner herein, and has knowledge of this litigation and the matters set out in the petition; that the foregoing petition and the matters set forth are true to the best of his knowledge, information and belief.

J. NEWTON RAYZOR.

J. Newton Rayzor

Sworn to and subscribed before me this 18th day of July, A. D., 1936.

MRS. FLETA B. HANSCOM, *Notary Public in and for Harris County, Texas.*

I, J. Newton Rayzor, do hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration by this Honorable Court and is not filed for the purpose of delay.

J. NEWTON RAYZOR,

J. Newton Rayzor

Counsel for Petitioner.

NOTICE OF TIME OF SUBMISSION

The Respondent in the above cause, the United States, through its attorney the Solicitor General at Washington, D. C., will please take notice that the foregoing petition for a writ of certiorari will be submitted to the Supreme Court of the United States for decision at its court room, Supreme Court Building, Washington, D. C., forthwith from the date of this service.

Dated at Houston, Texas, July 18, 1936.

Yours respectfully,

J. NEWTON RAYZOR,
Counsel for Petitioner.

DUE PROOF OF NOTICE

I, J. Newton Rayzor, counsel for Petitioner, do hereby certify that service of the Petition, Record, and Brief herein was made upon the Solicitor General of the United States at Washington, D. C., by mailing to the Solicitor General a copy of the within petition and accompanying brief, and a copy of the record, by registered mail, return receipt requested, at the postoffice at Houston, Texas, on July 21, A. D., 1936, same being within ten days after the filing thereof.

J. Newton Rayzor

Sworn to and subscribed before me this 21st day of July, A. D., 1936.

Mrs. Fleta B. Hanna
Notary Public, Harris County, Texas

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Claimant of the STEAMSHIP "SANTOS MARU",
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vs.

UNITED STATES OF AMERICA,
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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

BRIEF OF PETITIONER

The opinion of the District Court appears in 1935 A. M. C. 1176; here in R., pp. 16-17.

The opinion of the Circuit Court of Appeals appears here in R., pp. 32-36.

GROUNDS OF JURISDICTION

The rulings of the United States Circuit Court of Appeals which we submit are erroneous and should be reviewed by this Court are as follows:

1. The holding that the immigration authorities have the power under Section 146, Title 8, Mason's U. S. C., to issue orders requiring the detention of aliens aboard the vessel without landing, and not merely the power to promulgate regulations designating times and places for the landing of aliens.

2. The holding that a regulation, made by the Commissioner General of Immigration under the general grant of power to promulgate regulations in accordance with the provisions of the Immigration Act contained in Sec. 102, Title 8, Mason's U. S. C., can have the force of law under Section 146 when not made in accordance with the terms of said Section 146.

3. The holding that Section 146 applies to the case of "through passengers", i. e., passengers being transported between foreign ports via an American port of call, the holding of the Circuit Court being contrary to the reasoning of Taylor vs. United States, 207 U. S. 120, 28 S. Ct. 53, 52 L. Ed. 130, as well as decisions of the Circuit Court of Appeals of the Second Circuit.

4. The holding that the penal provisions of the Immigration Act can be enforced in cases not clearly within its terms.

BRIEF STATEMENT OF FACTS

The immigration authorities at New Orleans, Louisiana, on June 11, 1932, served upon the master of the steamship Santos Maru an order in writing instructing him to detain aboard the vessel at all American ports all third class passengers. Subsequently at Galveston, Texas, the third class passenger Salvatore Sprovieri escaped, through the negligence of the officers and crew of the vessel the District Court found. Sprovieri was an alien being transported from Brazil to Japan on a through ticket, with no visa entitling him to admission into the United States. The agent of the vessel reported his escape, and he was subsequently apprehended and deported on another vessel of your petitioner. The Secretary of Labor instituted this libel to recover a fine under Section 146, Title 8, Mason's U. S. C., (Section 10 of

the Act of February 5, 1917, as amended by the Act of May 26, 1924, Section 27) for failure to prevent the landing of an alien at a time and place other than that designated by the immigration authorities. (R., pp. 16-17.)

SUMMARY OF ARGUMENT

First, your petitioner contends that Section 146 makes provision only for securing proper landing of aliens by compelling transportation agencies to present them only at designated times and places; the section gives no authority to prohibit entirely the entrance or landing of aliens, nor to issue detention orders.

Second, it is our contention that Section 146 does not apply to "through passengers" and makes no provision for the enforcement of administrative regulations respecting the handling of "through passengers".

Third, it is our contention that the penalties provided by Section 146 can be imposed only where the provisions of Section 146 have been violated; that there is no authority given in the Immigration Act or in Section 146 to make the penal provisions of Section 146 applicable to all infractions of administrative regulations, and that the entire character of the Immigration Act, as well as the general rule of law requiring a strict construction of penal statutes, speaks against such a general grant of power to the Commissioner General of Immigration.

1. Section 146, Title 8, Mason's U. S. C., under which the libel was brought, provides penalties for failure to observe regulations made concerning times and places of landing aliens, and gives no authority to the Commissioner General of Immigration to issue general orders of detention.

Section 146, Title 8, Mason's U. S. C., (Section 10 of the Act of February 5, 1917, as amended by the Act of May 26, 1924, Section 27) in substance provides as follows:

> "(a) It shall be the duty of every person . . . to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers. . . . .

(b) Proof that the alien failed to present himself at the time and place designated by the immigration officers shall be prima facie evidence that such alien has landed in the United States at a time or place other than as designated by the immigration officers".

No mention is made in said Section 146, either in paragraph (a) or paragraph (b), of detention of an alien aboard a vessel or the issuance of orders compelling a master or agent so to detain an alien aboard a vessel. If there were any doubt at all about the meaning of paragraph (a) of the section, it would be resolved by paragraph (b), which clearly contemplates the designation of a time and place for landing by the immigration officers and does not contemplate the absolute prohibition of landing by those officers under this section.

That the Commissioner General himself is aware of the meaning of the section is shown by the order made in the case of United States vs. SS Coamo, 267 U. S. 220, 45 Sup. Ct. 237, 69 L. Ed. 582. In that case the master was ordered to present the two aliens concerned at Ellis Island. On his failure to do so this Honorable Court held the vessel liable for a fine of $1,000.00 for each alien.

As a contrast with the silence of Section 146, Title 8, Mason's U. S. C., with respect to the issuance of detention orders, Section 147 provides for the detention of aliens for observation and examination and provides that aliens shall be detained on board the vessel at the expense of such vessel as circumstances may require or justify; Section 154 provides for the deportation of aliens brought in in violation of law and provides penalties for failure to detain such aliens aboard a vessel when it is so ordered; Section 167 provides for the detention of alien seamen on board a vessel. Each of these sections

speaks clearly respecting the detention of aliens and the issuance of orders respecting such detention, in marked contrast with the complete silence of Section 146 respecting detention orders. In view of the specific provisions of these Sections and the silence of Section 146, it is submitted there can be no doubt that if Congress had intended detention orders to be issued under Section 146 that pertinent language to that end would have been used.

It is therefore submitted on this point that the language of the Act is clear and free from ambiguity and that the proper construction of the Act has received the tacit approval of this Court in the case of the United States vs. Coamo, *supra*.

2. Transporting a passenger to a foreign country on a through ticket via an American port of call is not "bringing an alien to the United States" within the meaning of Section 146, Title 8, Mason's U. S. C. (Section 10, Act of February 5, 1917, as amended by Act of May 26, 1924, Section 27).

The words of Section 146, Title 8, Mason's U. S. C., "bringing an alien to the United States" are first construed by this Honorable Court in Taylor vs. United States, 207 U. S. 120, 28 S. Ct. 53, 52 L. Ed. 130, in which a unanimous court speaking through Mr. Justice Holmes said:

> "The reasoning is not long. The phrase which qualifies the whole section is 'bringing an alien to the United States'. It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States', taken literally and nicely, means, transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back and merely as incident to employment on the instrument of transport."

This interpretation was followed in construing similar language of Section 145, of Title 8, Mason's U. S. C.,

by the Circuit Court of Appeals for the Second Circuit in The President Adams (Dollar Steamship Line vs. Elting), 51 F. (2d) 1035, 1931 AMC 1509 (1931), though it may well be noted here that the meaning of the words in that Section is made clearer by the heading, where the section is summarized by denominating it "bringing *in* aliens subject to disability."

More recently, on facts identical with those of the instant case, the Circuit Court of Appeals for the Second Circuit has reaffirmed its view in affirming the holding of the District Court in The Alphonso XIII, etc., 53 F. (2d) 124, on appeal styled The Havana, etc., 63 F. (2d) 812 (1933). In that case certain foreigners were being transported from Mexican ports to Spain by ports of call in the United States, and after issuance of orders to the masters to detain the aliens on board, the aliens escaped into the United States. The Circuit Court of Appeals held that the cases were ruled by the decision in The President Adams, *supra,* and that the repeated adoption by Congress of the section in question without material change following the interpretation given it in Taylor vs. United States, *supra,* brought the construction of the statute within the rule of those decisions which hold that where a statute has been so re-enacted it incorporates existing judicial interpretations, citing United States vs. Cerecedo Hermanos y Compania, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821; Bruce vs. Tobin, 245 U. S. 18, 38 Sup. Ct. 7, 62 L. Ed. 123; Louisville Cement Company vs. Interstate Commerce Commission, 246 U. S. 638, 644, 38 Sup. Ct. 408, 62 L. Ed. 914; Heald vs. District of Columbia, 254 U. S. 20, 23, 41 Sup. Ct. 42, 65 L. Ed. 106.

In The Havana, *supra,* the contention made in the instant case and made the basis of the opinion of the court

below was also made, that is, that the amendment of Section 146 by the Act of 1924 avoided the effect of the decision in Taylor vs. United States, *supra,* and made clear Congress' intention to apply Section 146 to cases where an alien comes to the United States aboard a vessel even though he is travelling on a through ticket and the steamship company brings him to the United States only as incident to transporting him to a foreign country. Both the District Court and the Circuit Court rejected this contention, it being pointed out by the District Court that the amendment made was necessary to provide for the extension of the section to embrace toll roads and bridges as well as steamship companies. The District Court also pointed out that the notices served by the immigration officers were not in accordance with Section 146 because they were detention orders, not orders designating a time or place for landing of aliens as provided by the section.

Your petitioner respectfully submits to this Honorable Court that the careful consideration given the statute by the District Court in The Alphonso XIII, *supra,* and by the Circuit Court of Appeals for the Second Circuit, in The Havana, *supra,* has led to a correct interpretation of the statute by those courts, and that the opinions of this Honorable Court in Taylor vs. United States, *supra,* and United States vs. Coamo, *supra,* conclude the matter.

3. The Commissioner General has no power to make regulations independently of the Statute and has no power to issue orders under Section 14[illegible] except consistently therewith, and the penalties provided f[illegible] in Section 146 are provided only for violations of its provisions.

In the instant case the order made by the immigration officer was an order of detention, prohibiting the landing of the alien at any port of the United States, and

this order was not made as a rule or regulation respecting the time or place of landing of the alien. Since the order was not made in accordance with the terms of Section 146, it therefore did not have the force of law, and a failure to comply strictly with its terms is not punishable by libel brought under Section 146.

By Section 102, Title 8, Mason's U. S. C., the Comsioner General of Immigration is specifically empowered to establish rules and regulations only where such rules are "not inconsistent with law", were it necessary even to refer to the provisions of the statute when it is so clearly established law that an administrative official cannot make regulations which are not within the terms of the statute interpreted. Iselin vs. United States, 270 U. S. 245, 46 Sup. Ct. 248, 70 L. Ed. 566; Merritt vs. Cameron, 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772. Furthef, it is a well recognized rule of law that doubtful terms which have acquired through judicial interpretation a well understood legislative meaning are presumed to be used by the legislature in the sense determined by authoritative decisions. The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; Hackfeld & Company vs. United States, 197 U. S. 442, 25 S. Ct. 456, 49 L. Ed. 826. Since the language interpreted in Taylor vs. United States, *supra*, has not been altered, the changes in the section being additions and not corrective amendments, it follows that both by the clear terms of the statute and by the established rules of law that the Commissioner General could not make regulations respecting "through passengers" under the grant of power contained in Section 146.

A reference to its provisions reveals that the Immigration Act is highly penal in character. Even due care to observe the provisions of the statute is insufficient to relieve a carrier from liability. The Nanking, 290 F. 769

(CCA 9, 1923). There is no general clause providing a penalty for violations of the various parts of the statute, but each part provides for its own penalty. Sections 138, 139, 144, 145, 146, 150, 154, 156, 163, 167, 171, Title 8, Mason's U. S. C.; United States vs. SS. Coamo, *supra*, The Presidente Wilson, 56 F. (2d) 742 (CCA 2, 1932). As a penal statute, the statute should be construed to apply only to cases coming plainly within its terms. United States vs. Northern Pacific Railroad Company, 242 U. S. 190, 37 S. Ct. 22, 61 L. Ed. 240.

An interpretation of the statute to uphold orders of detention under Section 146, as in this case, would make a vessel liable for double penalties whenever an alien escapes after a detention order is made, for the vessel would be liable under Section 146 for failure to present the alien at a proper time and place and would also be liable under the Section providing for the issuance of the detention order. Such a construction is opposed to the entire tenor of the Immigration Act, with its specific penalties for each particular offense. Further, if detention orders could be issued under Section 146, these orders would be unlimited in nature since that Section is absolute in terms. This leads to the preposterous conclusion that the other Sections of the Immigration Act are merely directory—regulations could be made by the authorities as they saw fit since they could prohibit any person they pleased from landing under Section 146.

In short, your petitioner herein respectfully submits that the case comes clearly within the rules laid down by Chief Justice Marshal in the case of United States vs. Wiltberger, 5 Wheat. 73, 5 L. Ed. 37, 92, quoted in Hackfeld & Company vs. United States, *supra*, as follows:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

Wherefore, petitioner prays that the judgment of the Circuit Court of Appeals herein be reversed and that the judgment of the District Court be affirmed and for such other relief as may be proper.

Respectfully submitted,

J. NEWTON RAYZOR,

Attorney for Osaka Shosen Kaisha Line.